

Supreme Court, U. S.
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in the
Supreme Court
of the
United States

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CASE NO. **79-587**
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PLACIDO PINERO and ROBERTO RAMIREZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

—
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

—
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CASE NO.

PLACIDO PINERO and ROBERTO RAMIREZ,
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vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

The Petitioners, PLACIDO PINERO and ROBERTO RAMIREZ, through counsel, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on September 6, 1979.

OPINION BELOW

The opinion of the Court of Appeals is not reported. That opinion is set forth in Appendix A to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254. The judgment of the Court of Appeals was entered on September 6, 1979, and is set forth in Appendix A. This Petition is timely filed.

QUESTION PRESENTED FOR REVIEW

Whether the evidence presented by the Government was sufficient to prove the Defendants' guilt beyond and to the exclusion of every reasonable doubt and so afford them their right to due process of law.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

The Defendants were charged by Indictment with Conspiring to Import Marijuana and Conspiring to Possess Marijuana with the Intent to Distribute.

The Defendants were tried by a jury which found them guilty as charged.

The Defendants filed a Motion for Judgment of Acquittal which was denied.

The Defendants were sentenced to three (3) years imprisonment to be followed by a term of seven (7) years probation.

On appeal, the Fifth Circuit Court of Appeals affirmed the Defendants' convictions. See Appendix A. This Petition follows.

REASONS FOR GRANTING THE WRIT

The evidence presented by the government was insufficient to prove the Defendants' guilt beyond and to the exclusion of every reasonable doubt and so afford them their right to due process of law.

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

Due process of law requires that every accused be afforded the protection provided for by law and that they may only be convicted of a crime when the prosecuting authority (Government) proves their guilt in accordance with the standards of proof set by the law. In a criminal case, that burden of proof which is assumed by the prosecuting authority requires that it prove an accused's guilt beyond and to the exclusion of every reasonable doubt. *Mullaney v. Wilbur*, 412 U.S. 684, 696-702 (1975).

The Defendants in this case were accused of Conspiracy. The elements of conspiracy each of which due process required the Government to prove beyond a reasonable doubt are:

1. That the conspiracy described in the Indictment was wilfully formed, and was existing at or about the time alleged.
2. That the accused wilfully became a member of the conspiracy.
3. That one of the conspirators thereafter knowingly committed at least one of the overt acts alleged in the Indictment, at or about the time and place alleged.
4. That such overt act was done in furtherance of some object or purpose of the conspiracy, as charged.

United States v. Thompson, 533 F.2d 1006 (6th Cir. 1975).

The Indictment which was filed in the instant case is Appendix D of this Petition. That Indictment listed only two overt acts:

1. On or about June 2, 1978 Roberto Ramirez and Placido Pinero left the Hookers Point, Tampa, Florida, area aboard the M/V Drew Ad.
2. On or about June 2, 1978 Robert E. Moser and Bennine Garcia, aboard the M/V James Allen met the M/V Drew Ad in the Gulf of Mexico. (Appendix D-2)

The elements of conspiracy which the Government was required to prove beyond a reasonable doubt in the instant case were:

1. That the conspiracies (to import marijuana and to distribute) were wilfully formed, and were existing at or about the time alleged.
2. That Roberto Ramirez and Placido Pinero wilfully became members of these conspiracies.
3. That one of the conspirators thereafter knowingly committed at least one of the overt acts alleged in the Indictment on or about June 2, 1978.
4. That such overt act (Ramirez and Pinero leaving Tampa aboard the M/V Drew Ad and Garcia meeting the M/V Drew Ad) was done in furtherance of some object or purpose of the conspiracies, as charged.

The facts of the instant case are Appendix B (the Government's Statement of the Facts at trial in its Appellate Brief) and Appendix C (the Defendants' Statement of Facts at trial in their Appellate Brief).

The prosecution failed to present any tapes of conversation showing a conspiratorial enterprise between the Defendants and any other persons. The Government failed to produce any letters or memoranda showing a conspiracy between the Defendants and any other person. The Government failed to introduce testimony concerning any statements the Defendants may have made which tended to show they entered into such a conspiracy.

There is no evidence that the Defendant spoke to co-defendant Garcia or co-defendant Moser concerning a conspiracy. Garcia, testifying on his own behalf, stated that he had never seen the Defendants before, that the Defendants asked him for the time and direction, and that the Defendants told him they wanted to go to Miami. Co-defendant Moser testified that he had never seen the Defendants before and that he had never discussed marijuana with them. The Government failed to present any evidence to contradict this testimony and to show that the Defendants had spoken to or contacted Garcia or Moser concerning marijuana.

What the Government's evidence did show was that the vessel Drew Ad, carrying the Defendants, along with another vessel left Tampa. They sailed for a time with their running lights on. They were under surveillance by the Coast Guard. After sailing for hours, they approached a darkened silent boat, the James Allen. They came to within approximately one-half mile of the James Allen, then stopped. They flashed lights at the James Allen. The James Allen flashed back. The Government failed to present any evidence as to whether the flashes were a prearranged signal or whether they were merely to determine if there was any life aboard the James Allen. The Drew Ad approached the James Allen. There is no evidence the Drew Ad docked and then came in contact with the James Allen. The Drew Ad was four feet lower in the water than the James Allen. The Government witness testified that the night was dark. A railing and solid metal were around the bales of marijuana which were on the deck of the James Allen shielding them from the view of the Defendants on the Drew Ad which sat four feet lower in the water.

No lines connected the Drew Ad and the James Allen. Although the Drew Ad was next to the James Allen for ten to fifteen (10-15) minutes before the Coast Guard "bust", no marijuana in any quantity was found aboard the Drew Ad. The Defendants were arrested on the Drew Ad, not on the James Allen. There was no testimony that the clothes of the Defendants contained particles of marijuana such as would have been present if the Defendants had been loading or handling any bales of marijuana. Personal effects, food, clothing, and fishing gear such as would be present on a fishing trip were found aboard the Drew Ad. The Coast Guard did not monitor any radio communications between the Drew Ad and the James Allen.

In the instant case, the Government's evidence was not that of direct proof such as overheard conversations or intercepted messages, but rather it was circumstantial evidence based on inference and supposition. To sustain an inference based on circumstantial evidence, the inference to be drawn from the evidence must not only be consistent with guilt but must also be inconsistent with every reasonable hypothesis of innocence, *United States v. Ferg*, 504 F.2d 914 (5th Cir. 1974). If circumstantial evidence is such that a reasonable person may have a reasonable doubt as to the Defendants' guilt, the case should be submitted to the Jury, but the case should not be submitted if the evidence is so scant as to allow the Jury merely to speculate or to conjecture as to the Defendants' guilt, *United States v. Stephenson*, 474 F.2d 1353 (5th Cir. 1973). In a circumstantial evidence case one inference cannot be founded upon another to sustain a conviction, and the facts must be inconsistent with every reasonable hypothesis except that of guilt,

United States v. Schorr, 462 F.2d 953 (5th Cir. 1972). When a case rests entirely upon circumstances it must be so clearly proven that they point, not merely to the possibility or probability of guilt, but to a moral certainty of guilt. The inferences which may reasonably be drawn from the facts proven as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence, *Ab Ming Cheng v. United States*, 300 F.2d 202 (5th Cir. 1962).

Case decisions have also discussed sufficiency of evidence questions in conspiracy prosecutions. The inquiry as to the sufficiency of the evidence of a conspiracy conviction is whether the Jury could reasonably, logically and legally infer from the evidence presented that the Defendants were guilty beyond a reasonable doubt, or, whether the Jury could reasonably find that the evidence was inconsistent with every hypothesis of innocence. To convict of conspiracy, the Government is required to prove beyond a reasonable doubt that a conspiracy existed, that the accused knew it existed and, with that knowledge voluntarily joined it, *United States v. Littrell*, 574 F.2d 828 (5th Cir. 1978). To warrant a conviction of drug conspiracy, it is not enough for the Government to prove that the Defendants might have been guilty. The Government is required to prove, beyond a reasonable doubt, that the Defendants were in fact guilty, *United States v. Caro*, 569 F.2d 411 (5th Cir. 1978). Where conspiracy is charged, the Government must prove specific intent to violate the substantive statute beyond a reasonable doubt, *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975). To sustain a conspiracy conviction, the evidence, when viewed in its entirety must generate more than a

mere suspicion of guilt. Where the evidence is equally consistent with both guilt and innocence a conviction cannot be sustained, *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974). A Defendant's participation in a conspiracy can be established only by proof, properly admitted into evidence, of his own words and deeds, and such independent proof must be substantial and not slight, *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963). Evidence sufficient to cast suspicion upon a Defendant charged with conspiracy is not enough to sustain a conviction, *Glover v. United States*, 306 F.2d 594 (10th Cir. 1962). To establish intent, in a conspiracy prosecution, evidence of knowledge must be clear and not equivocal, *Dennis v. United States*, 302 F.2d 5 (10th Cir. 1962). To convict a Defendant of participating in a conspiracy, there must be some evidence tending to prove that he entered into an agreement and that he knew that the argument had the specific unlawful purpose charged in the Indictment, *United States v. Cooper*, 567 F.2d 252 (3d Cir. 1977). Where conspiracy is charged, the Government has the burden of establishing that the Defendant had the specific intent to violate the substantive statute. The required intent is neither less nor more than that necessary to commit the substantive crime, *United States v. Friedman*, 506 F.2d 511 (8th Cir. 1974). To connect a Defendant with a conspiracy, the proof must be individual and personal. The Government must prove beyond a reasonable doubt that each member of the conspiracy had the knowing, deliberate and specific intent to join the conspiracy, *United States v. Prince*, 515 F.2d 564 (5th Cir. 1975).

The Government's proof in the instant case consisted solely of the fact that Defendants were in a boat next to the James Allen at a point in time when the

James Allen had bales of marijuana upon its deck. It cannot be disputed that marijuana was present, but no one was charged with possession of marijuana. The Defendants were charged with conspiracy not because of any intercepted communications or actions on their part which would prove they were members of such a conspiracy, but because they were in a boat located next to the James Allen when the Coast Guard swooped down. Proximity to a crime does not suffice to tip the balance, and even actual presence at the scene of a crime is not sufficient, *United States v. Littrell*, 574 F.2d 828 (5th Cir. 1978).

In *Littrell*, *supra*, the Court found that evidence that a phone call was made, the Defendant drove up, a co-defendant stated, "the man is here" and cocaine found in the car Littrell drove up in was insufficient to support a conspiracy conviction stating:

These inferences (of guilt) are certainly plausible and perhaps even probable, but it is not enough for the Government to prove Littrell *might* (Court emphasis) have been guilty. The Government must prove guilt beyond a reasonable doubt, and to do so requires the exclusion of every reasonable hypothesis but that of guilt (p. 832).

In the case of *United States v. Dyar*, 574 F.2d 1385 (5th Cir. 1978), the Court found that suspicion and a Defendant's ten (10) minute association with the alleged co-conspirators was insufficient to support a conviction. In the instant case, the Drew Ad was only alongside the James Allen for ten to fifteen (10-15) minutes.

In the case of *United States v. Gutierrez*, 559 F.2d 1278 (5th Cir. 1978), the Court found the fact that a Defendant visited his uncle's house before each drug transaction and some of the Government's marked money was found in the uncle's house was insufficient to prove a conspiracy. In the instant case, there is no evidence that contraband, money, or even a tie line connected the occupants of the James Allen and the Drew Ad.

In the case of *United States v. Zule*, 581 F.2d 1218 (5th Cir. 1978), the Court found the facts that a Defendant's car was used in a drug delivery, that a co-defendant stated the car belonged to his "connection", that the Defendant was present at a drug transaction, and the Defendant conversed with a co-defendant before the drug transaction, did not constitute sufficient evidence to substantiate a conspiracy conviction.

In the case of *United States v. Cooper*, 567 F.2d 252 (3d Cir. 1977), the Court found that evidence that the Defendant rode across country in a truck containing marijuana was insufficient to sustain his conviction for conspiracy in the absence of evidence that the Defendant engaged in telephone or other communications of a conspiratorial nature. In the instant case, there is no evidence that the Defendants engaged in communications of a conspiratorial nature.

In the case of *United States v. Duckett*, 550 F.2d 1027 (5th Cir. 1977), the Court found that the Defendant's presence with his alleged co-conspirators at the arrest scene and that a pre-existing relationship existed between them was not sufficient to prove a

conspiracy. In the instant case, there is no evidence of a pre-existing relationship between the co-defendants. To the contrary, Garcia and Moser both testified, without contradiction, that they had never seen the Defendants before.

In the case of *United States v. Waddy*, 536 F.2d 632 (5th Cir. 1976), the Court reversed Defendant Gonzalez' conviction stating:

Gonzalez was in and out of the room of some of those participating in marijuana activities, and he carried clothing and suitcases between automobiles and motel rooms of those engaging in marijuana activities. Gonzalez associated with, talked to and helped them with the carrying of their effects. We do not know the subject of the conversations. We do not know the contents of the suitcases but they were apparently not filled with contraband when handled by Gonzalez. Twenty-four hundred years before this era Euripedes observed "Every man is like the company he keeps". Gonzalez kept bad company but of that he was not charged or convicted. His association with those found guilty of marijuana offenses fails to establish conspiracy. (p. 634).

In the instant case, there is no evidence the Defendants touched anything aboard the James Allen. There is no evidence that they left the Drew Ad.

In the case of *United States v. Johnson*, 513 F.2d 819 (2d Cir. 1975), the Court found that a Defendant's presence when drugs were found, his close association

with a co-defendant who pled guilty, and a false exculpatory statement after his arrest could not sustain a conspiracy conviction absent evidence the Defendant had any stake in importing the drugs or any connection with the acquisition, concealment, importation, use or sale of drugs. In the instant case, none of the evidence the Court deemed necessary in *Johnson* is present.

In the case of *United States v. Mendez*, 496 F.2d 128 (5th Cir. 1974), the Court held that evidence that a Defendant knew of her husband's drug activities and her presence during drug transactions was insufficient to support a conspiracy conviction. In the instant case, there is no evidence that the Defendants, sitting four feet lower than the James Allen and shielded from observing the bales on a dark night by a guardrail and metal shield, knew marijuana was on the James Allen. They had no nightscope to aid their vision such as did the Coast Guard. As to the possible scent of marijuana, not only was the Drew Ad lower in the water, but the Coast Guard did not smell the marijuana until they boarded the James Allen. There is no evidence that the Defendants were ever aboard the James Allen.

In the case of *United States v. Lopez-Ortiz*, 492 F.2d 109 (5th Cir. 1974), the Court found that evidence that the Defendant was present when marijuana was being unloaded and his flight from the officers was insufficient to sustain a conspiracy conviction. In the instant case, there was no evidence marijuana was being unloaded or was intended to be unloaded from the James Allen onto the Drew Ad. Bales were merely present on the James Allen's deck. The Defendants did not flee when the Coast Guard approached, but remained on their vessel.

In the case of *United States v. Arroyane*, 477 F.2d 157 (5th Cir. 1973), the Court held that prior association with a co-defendant, presence near the vehicle conveying contraband, and conversation with a co-defendant were insufficient to support a conspiracy conviction. In the instant case, there was no evidence of prior association with Garcia or Moser. There was also no evidence of communication between the parties concerning marijuana.

To convict for conspiracy, the proof must be sufficient to show that two or more persons conspired for an illegal purpose, *United States v. Netterville*, 553 F.2d 903 (5th Cir. 1977). A Defendant is not guilty of a conspiracy by reason of his commission of an overt act unless he was party to an unlawful agreement, *United States v. Cherry*, 295 F.2d 842 (4th Cir. 1961). A person can be convicted of guilty participation in a conspiracy on the basis of acts innocent in themselves only if he had guilty knowledge that what he did was in furtherance of a corrupt enterprise, *United States v. Rappaport*, 292 F.2d 261 (3d Cir. 1961).

The Government's evidence was that the Defendants approached the James Allen, stopped one-half mile away, flashed lights at the James Allen, then approached the James Allen. The James Allen had no lights on and was lying "dead" in the water. The Coast Guard witness himself stated that the James Allen could have been broken down for all he (witness) knew. It is logical for one ship, with lights on, approaching a seemingly "dead" vessel to attempt to signal the "dead" vessel to determine if anyone was aboard the "dead" vessel. There is no indication that the Defendants, on the Drew Ad, had any reason to know who or what was

aboard the James Allen. The Defendants submit that it is only good sense and cautious boatmanship to signal a dark, "dead" vessel lying motionless on the water on a very dark night. It is cautious reasonable behavior indicating only a hesitancy to "rush in" without knowing what one might be rushing into. No radio communications were intercepted. No evidence as to a prearranged code was introduced. The Government's suspicions that the flashes between the Drew Ad and the James Allen were a prearranged signal have no basis in evidence. According to the Government's theory, any vessel cautiously approaching the James Allen and flashing lights in an attempt to ascertain if life was aboard was there to ferry marijuana. Such a speculative supposition cannot support a conviction.

In the case of *United States v. Pena*, 527 F.2d 1356 (5th Cir. 1976), the Court held that in order to support a conspiracy conviction there must be evidence that the Defendant conspired with another specific individual. There is no evidence Pinero or Ramirez conspired with another specific individual. Garcia and Moser both denied conspiring with them and the Government failed to present any evidence to the contrary. The Government failed to present any evidence of the Defendants conspiracy with any "persons unknown" as alleged in the Indictment.

There is no evidence the Defendants knew the marijuana was to come from outside the country. There is no evidence that the Defendants knew marijuana in large quantities was on the James Allen. There is no evidence that the Defendants knew any marijuana was on the James Allen. There is no evidence that the Defendants conspired with Garcia or Moser. There is no

evidence to the contrary. There is no evidence that the Defendants conspired with "persons unknown".

The Defendants were aboard a vessel containing fishing equipment, food, clothing and personal effects. Their actions and equipment are entirely consistent with their having lost their way on a fishing trip needing directions, they cautiously approached a seemingly "dead", abandoned vessel. They asked Garcia the time and directions to Miami. At that point, the Coast Guard arrested them.

If mere presence were enough to convict, this hypothesis as to their presence is at least as reasonable as the Government's. But, presence alone is not enough to convict. The Government had to prove that a conspiracy existed, which it did not, that the Defendants willfully became members of the conspiracy, which it did not, that the Defendants willfully committed an act in furtherance of that conspiracy, which it did not.

Due Process of Law required the Government to prove each and every element of the alleged conspiracies beyond a reasonable doubt. The Government's case was purely circumstantial. In order for this circumstantial evidence case to be sufficient, the inferences, as to each element, must not only have been consistent with guilt but must also have been inconsistent with *every* reasonable hypothesis of innocence, beyond any reasonable doubt.

The Defendants submit that the Government's case did not rise to this standard of proof, and, as it did not, their convictions violate their Right to Due Process of Law. This Court's jurisdiction is properly invoked to resolve the conflicts existing between the above-cited cases and the facts of this case and to rectify the denial of Due Process the Defendants have suffered.

CONCLUSION

For the foregoing reasons, the Petitioners request this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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BY Paul Pollack

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing were this 9th day of October, 1979, mailed to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and one copy to the office of the United States Attorney, 300 Ainsley Building, 14 N.E. First Avenue, Miami, Florida.

Paul Pollack

PAUL POLLACK, ESQ.

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5643

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PLACIDO PINERO, ROBERTO RAMIREZ
and BENNIE GARCIA,
Defendants-Appellants.

**Appeals from the United States District Court
for the Middle District of Florida**

(SEPTEMBER 6, 1979)

Before THORNBERRY, CLARK and KRAVITCH,
Circuit Judges:
PER CURIAM: AFFIRMED. See Local Rule 21.¹

¹See N.L.R.B. v. Amalgamated Clothing Workers of America,
5 Cir., 1970, 430 F.2d 966.

The Trial

On the afternoon of June 2, 1978, Customs Patrol Officer Tenbieg was watching some activity around the shrimp docks in Tampa Bay (8/8, p. 44-45). Customs was watching two boats: the DREW AD and the MONACO. As they were watching, a car pulled up and five people got out of the vehicle. They put on a small amount of supplies, some fuel, and a few small bags of ice for the DREW AD and the MONACO (8/8, p. 46). Two men got in each of the boats (8/8, p. 47). Customs watched the boats take off and followed them to the mouth of Egmont Key. There they broke off surveillance and turned it over to a Customs plane to follow the boats from there on (8/8, p. 48).

Mr. Tenbieg identified Appellants Pinero and Ramirez at trial as the ones he saw getting on the DREW AD that day (8/8, p. 49-50).

The Coast Guard picked up surveillance of the two boats later that night (8/8, p. 53). They picked up their surveillance approximately six to eight miles offshore from Tampa Bay and followed them in a northwesterly direction (8/8, p. 54-55). The Coast Guard followed them on radar (8/8, p. 56). Using the radar and a night-scope to see in the dark, they followed and observed the two boats for an hour or so until they noticed that another larger boat appeared on the radar screen (8/8, p. 56-58). The two smaller boats were heading for the larger boat. The larger boat had no lights on (8/8, p. 58-59). The two smaller boats came within approximately one-half mile of the larger boat and then stopped. The Coast Guard then stopped, as well. This was about 12:45 a.m. on the

morning of June 3, 1978 (8/8, p. 59). Then the smaller boats started signalling with lights, first signalling each other, and then the larger vessel signalled back. The signalling went on for some time as the boats would flash signals to the larger boat, wait a while, and the larger boat would flash signals back (8/8, p. 60-61).

The smaller boats, the DREW AD and the MONACO, then started toward the larger vessel at a slow rate of speed (8/8, p. 61-62). When the Coast Guard could observe that the smaller boats were in contact with the larger boat, the Cutter proceeded forward. Through the night-scope, the Coast Guard could see the small boats maneuvering around the larger boat (8/8, p. 62). When the Coast Guard got within one thousand yards, they turned on their spotlights, illuminating the three vessels. There they saw the large vessel, the JAMES ALLEN, with a home port designated as Key West, Florida, with the smaller boat, the DREW AD, on the starboard side of the stern, laid up against it. The other smaller boat, the MONACO, was maneuvering around the stern of the JAMES ALLEN (8/8, p. 63).

In the lights, they could see two persons on the stern of the JAMES ALLEN, alongside a dozen or so bales of marijuana, stacked on the stern, end on end (8/8, p. 64). The bales were on the stern of the JAMES ALLEN separated from the DREW AD only by the railing of the JAMES ALLEN (8/8, p. 64). The Coast Guard told the boats to stay in their immediate position. Even after telling them to hold fast, the MONACO kept backing up and got out of sight (8/8, p. 67). The two persons on the stern of the JAMES ALLEN were Appellants Garcia and the captain, Moser (8/8, p. 68). Appellant Garcia

spoke Spanish to the two persons on the DREW AD, later identified as Appellants Pinero and Ramirez (8/8, p. 69, 71-72).

The Coast Guard boarded the JAMES ALLEN from the same position as the DREW AD on the starboard stern and, to do so, they had to climb over bales of marijuana, which they could smell as soon as they boarded (8/8, p. 70).

There were bales of marijuana throughout the boat, in the stern lazaret, the hold below the main deck was full, and also in the anchor chain locker in the forward end of the boat (8/8, p. 71). There was loose marijuana in the hold and on the deck among the bales (8/8, p. 72).

After the four men were placed under arrest, they were placed in a cabin area of the JAMES ALLEN where Officer Bagly heard Appellant Garcia state to Mr. Moser that they were caught because of bad contacts (8/8, p. 78-80).

The fishing nets on the JAMES ALLEN were tied to the outriggers (8/8, p. 82-83). The outriggers could not have been working in the manner in which they were tied. The nets would have had to be cut loose in order to make them functional (8/8, p. 100).

In all, 34,129 pounds of marijuana were aboard the JAMES ALLEN, packed in 803 bales, each weighing between 40 and 50 pounds (8/8, p. 122-123). Many of the bales had Spanish writing on them, some of them indicating Barranquilla, Colombia (8/8, p. 124). With a value of \$350.00 per pound, the cargo on board the JAMES ALLEN was worth in excess of \$12,000,000 (8/8, p. 122-123, 125-126).

Appellant Garcia called as a witness a Mr. Green who owns a marina around the Suwannee River in Florida (8/8, p. 149). He testified that in late May or early June, 1978 he received a distress call from the JAMES ALLEN, a shrimp boat, which reported they had starter problems, and he went out to answer the call. People on the JAMES ALLEN wanted someone to come out and get a man to take in to get parts to repair the boat (8/8, p. 151). Mr. Green went out and picked up a man from the JAMES ALLEN who didn't speak much English (8/8, p. 151). The Captain of the boat told Mr. Green to take this Spanish-speaking man in to get him a way to Tampa to pick up some parts (8/8, p. 152). So Mr. Green gave him a ride to the highway and to a bus station where he could get a bus back to Tampa. The next day that Spanish-speaking man came back with Appellant Garcia in a van (8/8, p. 153). Mr. Green took Mr. Garcia, along with a starter, some oil and a pump, along with some food and an ice chest back out to the JAMES ALLEN (8/8, p. 154). Mr. Green testified that although he had a 23 foot boat, and that the JAMES ALLEN was a 50 foot or larger boat, when he was standing on his boat he could see on the deck of the JAMES ALLEN (8/8, p. 156). At that time, there was nothing on the deck (8/8, p. 156). Mr. Green testified that when he went out there, there was no cargo on the JAMES ALLEN (8/8, p. 159).

Appellants called severed co-defendant Robert Moser as a witness (8/8, p. 160). He testified that Appellant Garcia came aboard the JAMES ALLEN and they installed a new starter and that Moser was able to repair the old cable so they did not need the cable to start it (8/8, p. 162). He testified that Garcia came

aboard the JAMES ALLEN on June 1, 1978 (8/8, p. 162), that prior to this date he had never seen Appellant Garcia and, to his knowledge, Mr. Garcia did not know that any marijuana was aboard the JAMES ALLEN.

Mr. Moser also testified that prior to the time Pinero and Ramirez were arrested he had never seen those men before (8/8, p. 163). Moser admitted, however, that he did not know the identity of those persons who were to come to pick up the marijuana. He knew that it would be at the spot that these boats in fact did meet him (8/8, p. 165). Moser also testified that Garcia was in the engine room briefly and that he could not see marijuana from the engine room (8/8, p. 169), although Officer Bagly had testified that on his trip to the engine room you could see bales of marijuana and, moreover, through the doorway of the engine room there is a small storage area forward, and there was marijuana stacked in there as well (8/8, p. 105).

Moser did admit under cross examination, that it was Appellant Garcia who stacked the marijuana on the deck of the JAMES ALLEN (8/8, p. 172). He testified that while he was in the pilot house blinking the lights toward the other boats, Garcia was on the stern, stacking the bales (8/8, p. 172, 180-182). Moser also testified that he was expecting the boats that arrived and that he was blinking at them as he was supposed to do (8/8, p. 172-173, 180-181). Moser testified that when it was determined that the boats were out there was when the marijuana was placed on the deck. Moser also testified that he speaks very little Spanish (8/8, p. 173).

Moser also admitted that when the Coast Guard came on board the starter was not working and Moser himself had to go down to start the engines (8/8, p. 182-183).

Appellant Garcia took the stand and testified that he had received a telephone call from a man he knew as "Wassa" (a Spanish word meaning Jewfish), who said he had a shrimper who needed a starter replaced and that he would pick up Garcia. He further testified that Wassa picked him up with another man whom he had never seen and, instead of heading for Tampa Bay, started heading north on the Interstate up toward the Suwannee (8/8, p. 194-196). He said Wassa then gave him \$400.00 and arranged to have him taken out to the boat (8/8, p. 196-197). He testified that he went down into the JAMES ALLEN engine room and fixed the starter. Garcia testified that he didn't get off the boat after the engine was fixed because someone was to have come to get him, but no one did (8/8, p. 204). He testified that the boat started heading toward Tampa Bay and was on its way until it ran out of oil and had to anchor (8/8, p. 205-206). Garcia testified that he became suspicious and quarreled with Moser, then went to the hatch and discovered the "illegal substance" on the boat and told Moser that he was going to throw it all off (8/8, p. 207). Garcia then said that he threw some on top of the deck, and some overboard, and at the point was when the Coast Guard arrived (8/8, p. 208). Garcia also testified that when Appellants Pinero and Ramirez came alongside the JAMES ALLEN they indicated that they wanted to get back to Miami (8/8, p. 210).

Garcia testified that, although he thought he was to go across town to fix the starter, he ended up going

about 150 miles north on a three hour drive with these people (8/9, p. 7-9). He testified that once he was on the boat he thought he would be there for a few hours, but ended up spending some thirty-six hours on the boat (8/9, p. 10-13). Garcia testified that Moser helped him take the bales out of the hold and that he doesn't remember any flashing lights from his boat (8/9, p. 15). He also testified that when the Coast Guard boat came up and the Coast Guard officers came aboard, he didn't mention anything about throwing some bales overboard, or the argument with Moser, or anything of that nature (8/9, p. 16-17).

STATEMENT OF THE FACTS

Prior to the taking of testimony, the trial court heard a Motion to Suppress the marijuana seized, which Motion was allowed to be adopted by all of the Defendants (8/7, P. 168).

On the Motion, John Bagley, a Coast Guardsman (8/7, P. 114), testified for the Government. He saw two boats come from the Tampa entrance of Anclote Bay and darkened his vessel (8/7, P. 116). He followed the boats at a distance of approximately four miles with his lights off (8/7, P. 116). The two boats had their running lights on (8/7, P. 117). At approximately midnight, the two vessels approached a third vessel which had no lights (8/7, P. 117, 118). The witness observed "flashings" between the boats (8/7, P. 119) which flashes resembled flashlights (8/7, P. 132). The witness did not know what the flashes meant (8/7, P. 133). The witness then saw the boats come together (8/7, P. 119). The witness then had the lights turned on on the Coast

Guard vessel (8/7, P. 120). He saw the Drew Ad alongside the larger vessel, James Allen (8/7, P. 120). He saw two men on the stern of the James Allen. He saw ten to fifteen (10-15) bales on the stern of the James Allen (8/7, P. 121). He didn't see any contraband in the open (8/7, P. 138) but at the distance of 1000 yards, he formed an opinion as to what was in the bales he saw on the James Allen (8/7, P. 137). The witness boarded the James Allen and conducted a search immediately after going on board (8/7, P. 154). The witness further testified that he didn't monitor any conversations between the boats (8/7, P. 128) and was unaware of any conversation between the boats (8/7, P. 135). The Defendants were aboard the Drew Ad, on which boat no contraband, but only fishing gear was found (8/7, P. 138). The Drew Ad was not on a "suspect list" of vessels possibly carrying contraband (8/7, P. 144). The witness also testified that on the night the Defendants were arrested, it was very dark, almost black (8/7, P. 130).

After argument (8/7, P. 171), the Court denied the Motion to Suppress (8/7, P. 192).

Prior to any testimony in the case, the Defendants moved for a Severance (8/8, P. 9) which was denied.

The Defendants were first seen boarding the Drew Ad in Tampa (8/8, P. 50). They put ice, fuel and supplies on the boat (8/8, P. 46). With their running lights on (8/8, P. 57), they sailed until they, after a time, approached a larger vessel (8/8, P. 58) which had no lights on (8/8, P. 59). The larger vessel was the James Allen. The Drew Ad was visible for a distance of *eight (8) miles* with its lights on (8/8, P. 87). After

approaching to within 1/2 mile of the James Allen (8/8, P. 59) the Drew Ad stopped and flashed its lights at its companion vessel (8/8, P. 60). The James Allen flashed a bright light (8/8, P. 60). The Drew Ad went towards the James Allen (8/8, P. 61). No radio conversation was heard between the Drew Ad and James Allen (8/8, P. 89). The Drew Ad was next to the James Allen for 10-15 minutes (8/8, P. 90). There were no lines between the Drew Ad and James Allen (8/8, P. 91). There was no marijuana on the Drew Ad (8/8, P. 92), although there was clothing, personal effects, food and fishing gear (8/8, P. 93). The Drew Ad sat *four (4) feet lower* in the water than the James Allen (8/8, P. 95). A railing and solid piece of metal shielded the bales on the James Allen from view (8/8, P. 94). The marijuana was found aboard the James Allen, not the Drew Ad. The James Allen could have been broken down for all the Coast Guard knew (8/8, P. 99).

No further evidence as to the Drew Ad was introduced by the Government. The Government did elicit testimony that writing on some of the bales indicated Barronquilla, Columbia (8/8, P. 124), although the Coast Guard did not know where the James Allen came from (8/8, P. 97).

The Defendants Motion for Judgment of Acquittal (8/8, P. 131) was denied (8/8, P. 133).

Robert Moser testified. He was aboard the James Allen. He never saw the Defendants before the Drew Ad stopped (8/8, P. 163). He never had any agreement with the Defendants concerning marijuana (8/8, P. 163). He never had any discussions with the Defendants

concerning marijuana (8/8, P. 163). He did not know who was coming for the marijuana (8/8, P. 165).

Bennie Garcia testified that he came aboard the James Allen to fix its starter (8/8, P. 193,200). He was the other person aboard the James Allen. He had never seen the Defendants before (8/8, P. 209). The Defendants asked him for the time and direction (8/8, P. 209). The Defendants said they wanted to return to Miami (8/8, P. 210). The Defendants never mentioned marijuana (8/8, P. 211). Moser told him three speedboats would pick up the marijuana from the James Allen (8/9, P. 18).

The Defendants rested and their Motion for Judgement of Acquittal was denied (8/9, P. 21).

The Jury returned verdicts of guilty as charged.

This appeal follows.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE No. 78-52-CR-TH

UNITED STATES OF AMERICA,

v.

PLACIDO PINERO; ROBERTO RAMIREZ;
BENNIE GARCIA; and ROBERT E. MOSER

The Grand Jury charges:

On or about June 1, 1978 and continuing thereafter until June 3, 1978, in Tampa, Florida, Middle District of Florida and elsewhere,

PLACIDO PINERO;
ROBERTO RAMIREZ;
BENNIE GARCIA; and
ROBERT E. MOSER

did unlawfully, willfully, and knowingly combine, conspire, and confederate and agree together with each other, and with others to the Grand Jury unknown, to commit the following offenses:

1. To knowingly import approximately 34,000 pounds of marijuana, a Schedule I controlled substance, into the United States from a place outside the United

States; in violation of Title 21, United States Code, Section 952(a).

2. To knowingly possess with intent to distribute approximately 34,000 pounds of marijuana, a Schedule I controlled substance; all in violation of Title 21, United States Code, Section 841(a) (1).

In furtherance of the conspiracy, and to effect the object thereof, one or more of the Defendants performed one or more overt acts among which were the following:

OVERT ACTS

1. On or about June 2, 1978 ROBERTO RAMIREZ and PLACIDO PINERO left the Hookers Point, Tampa, Florida, area aboard the M/V DREW AD.

2. On or about June 2, 1978 ROBERT E. MOSER and BENNIE GARCIA, aboard the M/V JAMES ALLEN met the M/V DREW AD in the Gulf of Mexico.

All in violation of Title 21, United States Code, Sections 963 and 846.

A TRUE BILL

[Illegible]
FOREMAN

JOHN L. BRIGGS
United States Attorney
By: /s/ W. Christian Hoyer
W. CHRISTIAN HOYER
Assistant United States Attorney